83-6312

No. 83-_____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

MICHAEL C. ANTONELLI,

Petitioner,

-v-

FEDERAL BUREAU OF INVESTIGATION, et al.,

Respondents.

PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: February 2., 1984

QUESTION PRESENTED

The Seventh Circuit's decision in this Freedom of Information Act case raises a fundamental issue regarding the FBI's duties in responding to a third party request under the Freedom of Information Act:

> Is the FBI discharged from its statutory burden under the Freedom of Information Act to search for responsive documents, disclose nonexempt documents, and justify its claim of exemption with respect to any documents withheld, on the grounds that the requesting party has not identified a "viable public interest" supporting disclosure of the information?

In addition to raising an important federal issue affecting the availability of information held by the FBI, the Seventh Circuit's decision creates a direct conflict in the circuits.

PARTIES TO THE PROCEEDINGS

Petitioner Michael C. Antonelli, a private individual, was appellee below. Respondents Federal Bureau of Investigation and the United States Department of Justice were appellants below.

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COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Michael C. Antonelli respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on November 22, 1983.

OPINIONS BELOW

The opinion of the court of appeals is reported at 721 F.2d 615 and begins on page A-1 of the attached Appendix. The district court's opinion denying the FBI's motion for summary judgment is reported at 536 F. Supp. 568 (N.D. Ill. 1982) and begins on page B-1 of the Appendix. The district court's opinion certifying the case for interlocutory appeal and granting a stay pending appeal is reported at 553 F. Supp. 19 (N.D. Ill. 1982) and begins on page C-1 of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on November 22, 1983. Jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, is the only statute involved. 5 U.S.C. § 552(a)(3) provides:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(4)(B) provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

5 U.S.C. § 552(b) provides:

> This section does not apply to matters that are --
>
> * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the

> confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
>
> * * *
>
> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT OF THE CASE

This petition seeks review of the Seventh Circuit's decision that a person requesting third party information under the Freedom of Information Act (FOIA) must identify a "viable public interest" in disclosure before the FBI is required to search for responsive documents, disclose nonexempt documents, or justify its claims of exemption with respect to any documents withheld.

Antonelli's Request and the Government's Response

During the first four months of 1979, the petitioner submitted several FOIA requests for FBI records concerning himself and a number of third parties. The FBI produced some of the requested materials, but it refused to confirm or deny the existence of any records pertaining to eight third party requests.*/ Instead, the FBI took the position that the Privacy Act, 5 U.S.C. § 522a(b), prohibited the release of any information absent valid notarized affidavits from the named third parties consenting to the disclosure of their records to the petitioner. App. A-2. In the absence of such affidavits, the petitioner's requests were summarily denied.**/

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*/ The requests seek FBI records concerning eight individuals involved in the 1974 robbery of the Purolator Security Company: Peter Gushi, Raymond Bottari, Calogero Ravana, William Anthony Marzano, James Dvornik, G. Roger Markley, Roy Bridges, and John Cartalino.

**/ The FBI dropped its Privacy Act arguments on appeal.

After exhausting his administrative remedies, the petitioner filed the present action on October 29, 1979, pursuant to 5 U.S.C. § 552(a)(4)(B), seeking to compel the FBI to search its files for records responsive to his requests and to produce nonexempt records. The petitioner's verified complaint contained allegations that the persons named in his requests would be neither surprised nor embarrassed by disclosure of the existence of FBI records.

In response, the FBI moved for summary judgment. Relying solely on the affidavit of Special Agent Donald Smith, and without disputing the petitioner's factual assertions, the FBI reiterated its refusal to confirm or deny the existence of any files concerning the eight individuals. Smith Affidavit ¶70. The affidavit did not indicate that the FBI had made any effort to locate and review the requested records, and indeed stated that no examination of the actual records was necessary to justify their exemption from the disclosure provisions of the FOIA. According to Agent Smith, the requested records -- if they existed -- could consist only of personnel files exempted by FOIA Exemption 6 or investigatory files exempted by FOIA Exemption 7. Although he recognized that those exemptions are not absolute, he stated that "there is apparent to me no identifiable general public interest" in the disclosure of such files if they exist. Id. ¶76. Smith then "balanced" this asserted lack of public interest against his opinion that "[t]he mere affirmation that an individual was the subject of an FBI investigation would in itself be a clearly unwarranted invasion of that individual's personal privacy." Id. ¶74. He concluded that the petitioner's requests should be denied. Id. ¶79.*/

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*/ Nevertheless, on the same day the Smith Affidavit was filed, the FBI produced several hundred pages of FBI records pertaining to three of the eight persons about whom Agent Smith refused to "confirm or deny the existence of any files." These records had been previously released to the petitioner in response to four of his other FOIA requests, and the FBI submitted them to the district court as exhibits in support of its motion for summary judgment on unrelated counts.

The District Court's Decision

After reviewing the Smith affidavit, District Judge Prentice H. Marshall found that the FBI's response was "incredible." App. B-4. The court concluded that "[t]he FBI's position here is clearly at odds with the procedures adopted in this and other circuits and violates the requirements of the FOIA." App. B-7.

Judge Marshall noted that, under "well settled" procedures,

> [i]n order to withhold information requested the agency must rely on the specific exemptions set out in § 552(b) of the Act. The agency has the burden of sustaining its claim of exemption and the exemptions are to be narrowly construed in order to further the policy of disclosure which is at the heart of the statute.

App. B-4 (citations omitted). Quoting from the Seventh Circuit's opinion in Stein v. Department of Justice & FBI, 662 F.2d 1245, 1253 (7th Cir. 1981), Judge Marshall ruled that the FBI can meet its burden of proving an exemption by submitting affidavits that "(1) describe the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically within the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of agency bad faith." App. B-4 (citations omitted).

Applying this standard, the district court found that the FBI had not met its burden of proving an exemption because it had "provided the court and the plaintiff absolutely no information on which to base a judgment of whether the requested material is exempt from the FOIA." App. at B-5. The court characterized the Smith affidavit, which was the only evidence produced by the FBI in support of its claims of exemption, as a

"hypothetical assertion of third party privacy interests" and concluded:

> If we were to hold that agent Smith's affidavit asserting that admitting the existence of an FBI file alone constitutes a "clearly unwarranted invasion of personal privacy" without even requiring a description of what the file is about we would be creating a blanket exemption from the FOIA which the FBI could assert at its discretion. The Congress specifically rejected such a broad exemption from the requirements of the act and we decline to permit it to be fashioned here.

App. B-7 (footnote omitted)(emphasis added). Accordingly, the district court ordered the FBI "to respond to the requests . . . by producing non-exempt documents and asserting with particularity any claimed exemptions within 30 days." App. B-10.

On August 11, 1982, the district court reaffirmed these rulings in an opinion granting the FBI's motion for a stay of the April 6, 1982 order pending interlocutory appeal. App. C-1. On January 11, 1983, the district court certified its April 6, 1982 order pursuant to 28 U.S.C. § 1292(b). App. C-7.

The Seventh Circuit's Decision

The Seventh Circuit reversed and remanded with instructions that the district court enter summary judgment in favor of the FBI. App. A-1. The court ruled that, because the petitioner had failed to identify a "viable public interest" in disclosure, the FBI was not required to locate the requested records or to assert with particularity its claims of exemption. App. A-5. The court held that the Smith affidavit met the FBI's "threshold burden of showing why the requested information is exempt from disclosure," even though the FBI had refused to confirm or deny the existence of the records that the petitioner requested. App. A-5.

The court conceded that under Stein v. Department of Justice, 662 F.2d 1245 (7th Cir. 1981) and Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), an agency has the initial burden of demonstrating why the documents are exempt from disclosure under the FOIA and must provide the reviewing court with a "detailed justification" for its denial of a FOIA request. App. A-3. Nevertheless, the court held that "the procedures prescribed in Stein and Vaughn should not be required in response to nonconsensual third party requests where the requesting party has identified no public interest in disclosure." App. A-3. The court reasoned that requiring the FBI to provide a detailed justification for denying a third party request could infringe on the privacy interests of the individuals described in the records and jeopardize FBI investigations. App. A-4.*/

REASONS FOR GRANTING THE WRIT

In conflict with the Second and Third Circuits and in contravention of Congress' express intent that a FOIA requester is not required to state a reason for requesting the documents, the Seventh Circuit's opinion grants the FBI a blanket exemption from third party FOIA requests unless the requesting party identifies a "viable public interest" in disclosure. The Seventh Circuit required the district court to grant summary judgment in favor of the FBI even though the district court had found that the FBI -- the moving party -- had provided "absolutely no information on which to base a judgment of whether the requested material is exempted from the FOIA." App. B-5.

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*/ The Seventh Circuit ignored the petitioner's uncontroverted allegations that the third parties here would be neither surprised nor embarrassed by disclosure of the existence of FBI records and the fact that, with respect to three of the third parties, the FBI already had released files concerning them to the petitioner.

Contrary to the policy of the FOIA, the effect of the Seventh Circuit's decision will be to require citizens to explain why they are requesting information and to deny information to citizens having merely private, as opposed to public, interests in obtaining it.

I. The Seventh Circuit's decision is contrary to the FOIA and creates a clear conflict in the circuits.

Under the Seventh Circuit's decision, the FBI is not required to furnish the district court with detailed justifications for nondisclosure of requested documents unless the requesting party has shown a "viable public interest" in disclosure. In the absence of such a showing, the district court cannot require the FBI even to confirm or deny the existence of the requested records, let alone give the district court an opportunity to review the records to determine whether they are exempt from disclosure. The Seventh Circuit's decision thus contravenes the statute's explicit requirement that the district court conduct a de novo review to determine whether an agency's withholding of information is justified and that the agency bear the burden of sustaining its withholding of information:

> [T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld ..., and the burden is on the agency to sustain its action.

§ 552(a)(4)(B) (emphasis added).

Moreover, the Seventh Circuit's decision comes directly into conflict with the Third Circuit's decision in Lame v. United States Department of Justice, 654 F.2d 917 (1981). There, in circumstances that are on all fours with the present case, the Third Circuit held that the FBI has the initial burden of justifying any withholding of requested information and that the district court must require a "detailed justification" of claimed exemptions.

The facts in Lame illustrate the sharpness of the conflict. There, as here, the FBI asserted in response to a third party request that it could properly refuse to confirm or deny the existence of the requested records because even an admission that it had such records would destroy the privacy interests of the third parties involved. 654 F.2d at 919-20. The district court denied the FBI's motion for summary judgment and gave it thirty days to supplement its conclusory affidavit. When the FBI responded by providing in camera samples of the documents that had been requested, the district court held that the claimed exemption applied. Id. at 920.

The Third Circuit reversed. It held that even the FBI's supplemented showing was insufficient to comply with its burden under the FOIA because "[e]ach document and its asserted exemption must be individually explained in terms of privacy or confidentiality." Id. at 928.*/ Accordingly, the Third Circuit held that the FBI must provide the district court with detailed justification of its determination to withhold the requested documents and must give the district court an opportunity to review the documents withheld:

> [T]he district court must have furnished to it, in whatever form, public or private, all of the detailed justifications advanced by the government for non-disclosure. The government must also give the court an opportunity to review all of the materials which the government claims to be exempt, even though the decision whether to inspect these materials rests with the district court.

Id. at 922.

The Seventh Circuit's decision also conflicts directly with the Second Circuit's decision in Diamond v. Federal Bureau

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*/ In contrast with the Seventh Circuit, the Third Circuit concluded: "We are not persuaded by the government's argument that there exists a per se rule that the mere connection of an individual with a criminal investigation, constitutes an unwarranted invasion of his privacy." 654 F.2d at 923 n.6 (citations omitted).

of Investigation, 707 F.2d 75 (1983), cert. denied, 52 U.S.L.W. 3550 (1984). There, the Second Circuit expressly approved the district court's requirement that the FBI review some 200,000 pages of requested third party documents in order to satisfy its duty to respond. 707 F.2d at 77 n.2. The Second Circuit also approved the district court's decision to conduct a de novo review and "to order an in camera inspection of a limited number of items, to see if non-exempt material may be segregated and released." 532 F. Supp at 220, 226, aff'd, 707 F.2d at 79.

Other circuits, although not in the specific context of third party FOIA requests, have uniformly held that federal agencies must make a particularized showing of any claims of exemption from the FOIA and that the district court must conduct a de novo review of the agency's determination to withhold information. See, e.g., Currie v. Internal Revenue Service, 704 F.2d 523, 530 (11th Cir. 1983) (documents are presumed subject to disclosure unless an agency proves an exemption; district court must determine the factual basis of an agency's claim of exemption); Holy Spirit Association for the Unification of World Christianity v. CIA, 636 F.2d 838, 845 (D.C. Cir. 1981) (trial courts must conduct de novo review of agency's claim of exemption), vacated on other grounds, 455 U.S. 997 (1982); Orion Research, Inc. v. Environmental Protection Agency, 615 F.2d 551, 553 (1st Cir.) (agency must furnish a detailed description of contents of withheld material and reasons for nondisclosure, correlating specific FOIA exemptions with relevant portions of the withheld material), cert. denied, 449 U.S. 833 (1980); Stephenson v. Internal Revenue Service, 629 F.2d 1140, 1145-46 (5th Cir. 1980) (district court must assure itself of the factual basis and bona fides of an agency's claim of exemption and may not rely solely upon agency's affidavit where alternative procedures would more fully provide an accurate basis for decision).

This Court should grant the writ to resolve this conflict in the circuits. Early resolution of the conflict is especially important here to prevent forum shopping by FOIA requesters. The FOIA allows a requesting party to bring suit in any of several forums: in the district where he resides, where he has his principal place of business, where the agency records are situated, or in the District of Columbia. 5 U.S.C. § 552(a)(4)(B). Under the present state of the law, the petitioner would have had better access to FBI records situated in the FBI's Philadelphia or New York offices than to the identical records kept in Chicago.*/

II. A party requesting information under the FOIA is not required to state a reason for the request, and the agency has the burden of proof to justify a claim of exemption.

The FOIA "is broadly conceived . . . to permit access to official information [and] to create a judicially enforceable public right to secure such information from possibly unwilling official hands. . . ." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973). Both of the relevant House and Senate subcommittees have adopted President Johnson's 1967 bill-signing declaration of the policy of the FOIA:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. * * * I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

House Comm. on Government Operations, Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act

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*/ The possibilities for forum shopping will be increased once the District of Columbia Circuit reaches the issue since that circuit's ruling will necessarily conflict with either the Second and Third or the Seventh Circuits. For example, if the District of Columbia Circuit agrees with the Second and Third Circuits, residents of the Seventh Circuit will receive different results depending on whether they bring suit in their local district court or the District of Columbia district court.

and Amendments of 1974 (P.L. 93-502) 9 (Joint Comm. Print 1975) (hereinafter cited as "Sourcebook").

The legislative history indicates that "Congress, in enacting the act, has adopted a policy that 'any person' should have clear access to identifiable agency records without having to state a reason for wanting the information...." H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 3 (1972), reprinted in Sourcebook at 10. Indeed, the requesting party is not even required to identify himself to the agency, let alone explain why he wants the records. See, e.g., Military Audit Project v. Casey, 656 F.2d 724, 730 (D.C. Cir. 1981); Benson v. General Services Administration, 289 F. Supp. 590, 593 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969). To the contrary, if the agency resists disclosure it has the burden of showing that one of the specific FOIA exemptions applies. 5 U.S.C. § 552(b)(1)-(9). In all cases, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

In violation of this Congressional policy, the Seventh Circuit's decision requires any person requesting third party documents from the FBI to state a reason for requesting the information. According to the Seventh Circuit's ruling, the requester must identify a "viable public interest" in disclosure before the FBI is obligated to justify its claims of exemption or even to search for and disclose the existence of the requested records. This ruling directly conflicts with the FOIA policy of disclosure to "any person" and will have the effect of denying access to federally held information to citizens with private, as opposed to public, interests in obtaining the information.*/

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*/ This Court has recognized that a requesting party's rights under the FOIA are not increased or decreased by the fact that the requesting party claims an interest in the requested information greater than that of an average member of the public. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975).

The Seventh Circuit's decision thus shifts the burden of proof in cases involving third party requests from the FBI to the requesting party. Under the Seventh Circuit's ruling, if the requesting party does not identify a "viable public interest" in disclosure, the FBI is discharged from its burden to make a particularized showing of exemption, or even to confirm or deny the existence of the requested records. This conflicts with the FOIA's explicit requirement that, in any case of withholding, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

The Seventh Circuit's rationale for placing the burden of proof on the requester in third party cases -- that release of material from FBI files would threaten the privacy of individuals whose files were requested and hinder FBI investigations -- has twice been considered and rejected by Congress. First, the records of the debates on the 1974 amendments to the FOIA indicate that the FBI was a major focus of the debates and that the FBI's concerns about individual privacy and hindrance of its law enforcement activities were fully aired. See Sourcebook at 339-44, 346-51 (remarks of Sen. Hruska). Congress ultimately concluded that those concerns did not justify any special exemptions for FBI files. As Senator Kennedy, the floor manager of the legislation, remarked during the veto override debate:

> [N]ot even the FBI should be placed beyond the law, the freedom of information law. Watergate has shown us that unreviewability and unaccountability in Government agencies breeds irresponsibility of Government officials. In this light, ... I would think the FBI would welcome the reviewability and accountability which the Freedom of Information Act amendments carry with them.

Sourcebook at 440-41.

In 1981, Congress considered amendments to the FOIA that would have given the FBI greater ability to deny FOIA

requests. In support of those amendments, FBI Director Webster testified that some requesting parties have utilized the FOIA to reveal confidential investigatory information and have frustrated ongoing investigations. App. A-4. Nevertheless, Congress rejected the proposed amendments and thereby continues to require the FBI to bear the burden of proof to justify claims of exemption. See 1982 Congressional Quarterly 3153 (Dec. 31, 1982).*/

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*/ Although the Seventh Circuit relied on Director Webster's testimony to support its decision (App. A-4), Congress did not enact the amendments and thus rejected any change in existing law to meet Webster's concerns.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: February 21, 1984

APPENDIX

formation. *See Waterford Condominium Association*, 432 N.E.2d at 1011; *Midwest Concrete Products Co.*, 418 N.E.2d at 990. Moreover, Hempel's position is founded on inapposite authority.[8] In short, Hempel asks the Court to acknowledge the validity of one rule for divining the parties' intentions in cases involving written contracts, while creating a divergent standard for cases concerning oral agreements. In the absence of Illinois precedent for such different treatment, we decline to do so.

Since there was no evidence supporting the jury's verdict that Hempel was a direct third party beneficiary of the oral agreement between Metal World and Ledoux, the district court acted correctly under Illinois law in granting Ledoux's motion for judgment notwithstanding the verdict. *See Pedrick v. Peoria & Eastern Railroad Co.*, 229 N.E.2d at 513–14. Accordingly, the judgment of the district court is affirmed.[9]

Michael C. ANTONELLI, Plaintiff-Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION, et al., Defendants-Appellants.

No. 82-1899.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 16, 1983.

Decided Nov. 22, 1983.

Plaintiff brought Freedom of Information Act suit seeking documents from Federal Bureau of Investigation. The United States District Court for the Northern District of Illinois, Prentice H. Marshall, J., 536 F.Supp. 568, denied FBI's motion for summary judgment on eight counts of plaintiff's request for records, and FBI appealed. The Court of Appeals, Bauer, Circuit Judge, held that FBI's refusal to confirm or deny the existence of records concerning third parties was an appropriate response to plaintiff's request for the documents, because FBI special attorney's affidavit met FBI's initial burden of showing why the requested information should not be disclosed and, because plaintiff sought documents concerning other persons, requiring the agency to provide a more detailed justification could infringe on the privacy interests of individuals described in the records and jeopardise valuable FBI investigations.

Reversed.

1. Records ⇐62

When party requesting documents under Freedom of Information Act has identified no public interest in disclosure of the documents, procedure by which agency provides a detailed analysis of the request and the reasons for invoking an exemption should not be required in response to nonconsensual third-party requests. 5 U.S.C.A. § 552.

2. Records ⇐62

Federal Bureau of Investigation's refusal to confirm or deny the existence of records concerning third parties was an appropriate response to plaintiff's request for the documents, because FBI special attorney's affidavit met FBI's initial burden of showing why the requested information should not be disclosed and, because plaintiff sought documents concerning other persons, requiring the agency to provide a

8. Neither *Bd. of Educ. of Dist. No. 68 v. Green Valley Builders, Inc.*, 40 Ill.App.3d 812, 352 N.E.2d 306 (1976), nor *Weather-Gard Indus., Inc. v. Fairfield Sav. & Loan Ass'n*, 110 Ill.App.2d 13, 248 N.E.2d 794 (1969) hold or suggest that this Court should endeavor to ascertain the intentions of the contracting parties during the course of performance.

9. Due to our disposition of the instant appeal, we need not review the district court's conditional granting of Ledoux's alternative motion for a new trial.

more detailed justification could infringe on the privacy interests of individuals described in the records and jeopardize valuable FBI investigations. 5 U.S.C.A. §§ 552(b), (b)(6, 7), 552a.

Elois E. Davies, Atty. Appellate Staff, Civil Div., U.S. Dept. of Justice, Washington, D.C., for defendants-appellants.

Andrew R. Running, Kirkland & Ellis, Chicago, Ill., for plaintiff-appellee.

Before BAUER, WOOD, Circuit Judges, and NEAHER, Senior District Judge.*

BAUER, Circuit Judge.

The Federal Bureau of Investigation (FBI) appeals from the district court's denial of the FBI's motion for summary judgment on eight counts of Antonelli's request for records under the Freedom of Information Act, 5 U.S.C. § 552 (1976) (FOIA). The district court denied the FBI's motion on the ground that the FBI failed to show that the requested information is exempt from disclosure under the FOIA exemption provisions, 5 U.S.C. § 552(b) (1976). Because we are persuaded that the FBI has met the FOIA exemption requirements, we reverse the district court's decision, 535 F.Supp. 568, and remand the case with instructions that the district court enter summary judgment in favor of the FBI.

I

Plaintiff-appellee Antonelli has been convicted of federal bank fraud charges and currently is serving his prison term in a federal penitentiary. During the first four months of 1979, Antonelli submitted numerous FOIA requests for FBI records concerning himself and a number of other individuals. The FBI produced some of the requested records, but declined to search its files for documents pertaining to eight of the individuals named in Antonelli's requests.

Antonelli then filed the present action in the district court to compel the FBI to release the requested information. The eight requests at issue here were consolidated into eight counts of Antonelli's thirty-seven count complaint. The FBI moved for summary judgment on these eight counts on the ground that the Privacy Act, 5 U.S.C. § 552a (1975), forbids the release of information to third party requesters unless either the individual about whom the records concern consents to disclosure or disclosure is mandated under the FOIA.

The eight individuals who were the subjects of Antonelli's request did not consent to disclosure of their records. In support of its motion for summary judgment, the FBI also offered an affidavit by FBI Special Attorney Donald L. Smith which stated that, if the requested records exist, they would be exempt from disclosure under the FOIA as either investigative files exempt under FOIA Exemption 7, 5 U.S.C. § 552(b)(7), or personnel records exempt under FOIA Exemption 6, 5 U.S.C. § 552(b)(6). The affidavit further stated that merely affirming the existence of such records could be an unwarranted invasion of the individual privacy that the FOIA exemptions are designed to protect. The FBI concluded that because Antonelli identified no general public interest in disclosing the requested information, the FBI was not required to confirm or deny that the files exist.

The district court rejected the FBI's argument and denied the summary judgment motion. The court ordered the FBI either to produce the requested documents, or to use the detailed affidavits prescribed in *Stein v. Department of Justice & FBI*, 662 F.2d 1245 (7th Cir.1981), to show that the documents are exempt from disclosure. The district court certified its order in January 1983, and this court granted Antonelli's motion for interlocutory appeal pursuant to 28 U.S.C. § 1291(b) (1982). The district court later granted the FBI's motion for a stay of its order pending this appeal.

* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

II

The Freedom of Information Act is designed to broaden public access to government information by mandating disclosure of federal agency documents. At the same time, Congress realized that some disclosures would intrude unduly into individual privacy and hamper legitimate governmental operations. The Act thus contains nine exemptions that allow agencies to withhold certain records. *See* 5 U.S.C. § 552(b).

In the instant case the FBI has relied on Exemptions 6 and 7(C) & (D), 5 U.S.C. § 552(b)(6) & (7)(C) & (D), to deny eight of Antonelli's requests. Exemption 6 covers "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 7 extends to "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would ... (C) constitute an unwarranted invasion of personal privacy, [or] (D) disclose the identity of a confidential source...."

[1] When asserting that requested information is exempt from disclosure, agencies usually follow the procedures prescribed in *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). Under *Vaughn*, the agency has the initial burden of demonstrating why it should not disclose the information. The agency must provide a "detailed analysis" of the request and the reasons for invoking an exemption. Once the agency meets this initial burden, the court will balance the agency's justification against the public interest in disclosure. This court approved the *Vaughn* procedure in *Stein v. Department of Justice*, 662 F.2d 1245, 1253 (7th Cir.1981), where we held that an agency must provide "detailed justification" for refusing a first party FOIA request.[1] (A request is termed "first party" when a person seeks his own records, in contrast to a third party request when one seeks another person's records.) In the instant case, the district court denied the FBI's motion for summary judgment because the FBI failed to provide this detailed analysis.

The FBI argues that the procedures prescribed in *Stein* and *Vaughn* should not be required in response to nonconsensual third party requests where the requesting party has identified no public interest in disclosure. We agree. The *Vaughn* procedure is a suggested approach for handling many FOIA requests; nevertheless, it is not required in all instances. Congress intended that the courts implement the exemptions by providing a workable formula to balance the dual interests of disclosure and privacy. No formula should sacrifice either of these goals. The *Vaughn* court struck this balance when it said that the detailed agency analysis "would not have to contain factual descriptions that if made public would compromise the secret nature of the information." 484 F.2d at 826.

Courts have recognized that in some instances even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect. In these cases, the courts have allowed the agency neither to confirm nor deny the existence of requested records. For example, in *Gardels v. CIA*, 689 F.2d 1100 (D.C.Cir.1982), the court held that the CIA was not required to reveal whether it maintained covert contact with a university in responding to an FOIA request for information concerning any such contact. The court said that "an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception." *Id.* at 1103. *See also Rushford v. Civiletti*, 485 F.Supp. 477 (D.D.C.1980), *aff'd mem.*, 656 F.2d 900 (D.C.Cir. 1981) (Department of Justice properly neither confirmed nor denied existence of rec-

1. The court in *Stein* required that the government discharge its burden by submitting affidavits that "(1) describe the withheld documents and the justifications for nondisclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically within the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of agency bad faith." 662 F.2d at 1253.

ords containing allegations that federal judges may have engaged in criminal or other misconduct).

III

[2] The FBI's refusal to confirm or deny the existence of some of the records that Antonelli requested was an appropriate response in this case. Smith's affidavit meets the FBI's initial burden of showing why the requested information should not be disclosed. Because Antonelli has requested documents concerning other persons, requiring the agency to provide a more detailed justification could infringe greatly on the privacy interests of the individuals described in the records.

Merely confirming that a particular file exists and stating the applicable exemption could reveal too much information where the requester seeks access to another person's files. For example, if the FBI denies a request for a specific third party's records on the ground that disclosure might reveal a confidential source (Exemption 7(D)), this denial itself may give the requester enough information to expose the subject of the inquiry to harassment and actual danger. At the least, revealing that a third party has been the subject of FBI investigations is likely to constitute an invasion of that person's privacy that implicates the protections of Exemptions 6 and 7.

With first party requests, references to other persons may be deleted from the released records to protect their privacy. In contrast, because third party requests like Antonelli's seek information about another person filed under that person's name, deletion of that party's name fails to protect that person's privacy.

Requiring the FBI to provide a more detailed justification for denial of requests for information also could jeopardize valuable FBI investigations. Again, merely acknowledging that a certain record exists can provide valuable information to requesters. FBI Director Webster testified before the Subcommittee on the Constitution of the Senate Judiciary Committee in 1981 that many requesters have used the FOIA to identify FBI informants and frustrate ongoing investigations.[2]

The FOIA exemptions are a response to Congress's concern that some requesters might use the FOIA to hinder intelligence operations. Congress indicated its concern in 1974 when it amended the FOIA exemptions to allow broader access to government documents. Senator Hart, the sponsor of the 1974 amendment to Exemption 7, stated:

> A question has been raised as to whether my amendment might hinder the [FBI] in the performance of its investigatory duties. The Bureau stresses the need for confidentiality in its investigatory duties. I agree completely....
> My amendment would not hinder the Bureau's performance in any way .... [The amendment] was carefully drawn to preserve every conceivable reason the Bureau might have for resisting disclosure of material in an investigative file:
>
> If informants' anonymity—whether paid informers or citizen volunteers—would be threatened, there would be no disclosure,
>
> . . . . . .
>
> If disclosure is an unwarranted invasion of privacy, there would be no disclosure ...;

2. Excerpts of Director Webster's December 10, 1981, testimony are reproduced in Supplemental Appendix to Appellant's brief. The testimony provides examples of how the FBI has lost valuable informants as a result of FOIA disclosures. Organized crime leaders apparently are especially adept at using the FOIA; Director Webster reported:

> [T]hirty-eight members and associates of the Detroit Organized Crime Family have made requests. The list of requesters reads like a Who's Who in Organized Crime in Detroit.
>
> Through this concerted effort, the members and associates of this Family have obtained over twelve thousand pages of FBI documents. The Family now is free to pool these materials and analyze the FBI's documents to whatever level of sophistication and scrutiny their abundant resources permit.

Appellant's Supplemental Appendix at 9.

> If in any other way the Bureau's ability to conduct such investigation was threatened, there would be no disclosure.

120 Cong.Rec. 17,040 (1974), *quoted in Miller v. Bell*, 661 F.2d 623, 626 (7th Cir.1981), *cert. denied sub nom. Miller v. Webster*, 456 U.S. 960, 102 S.Ct. 2085, 72 L.Ed.2d 484 (1982).

The FBI's response to Antonelli's request is consistent with the purposes behind the FOIA nondisclosure provisions. Imposing additional burdens on the FBI could hamper agency investigations or invade personal privacy.

IV

Antonelli contends that the FBI's position here in effect grants the agency a blanket exemption. We disagree. The agency still must meet its threshold burden of showing why the requested information is exempt from disclosure. Under the circumstances here, the Smith affidavit meets that burden.

The FBI would have had a greater burden if Antonelli had identified some public interest to be served by disclosing the information. Yet Antonelli's request failed to identify any viable public interest against which the court could weigh the privacy and agency interests at stake. The contention that "the public shares Antonelli's interest in ensuring that his convictions were not obtained as a result of a violation of the Constitution," Appellee's br. at 15, is insufficient. Some genuine public interest must exist to be balanced against the privacy interests protected by the FOIA exemptions. *See Baldridge v. Shapiro*, 455 U.S. 345, 360 n. 14, 102 S.Ct. 1103, 1112 n. 14, 71 L.Ed.2d 199 (1982) ("The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery."); *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir.1981) ("Plaintiff states in his brief that he is pursuing this litigation hoping to obtain evidence sufficient to mount a collateral attack on his kidnapping conviction.... The court, however, cannot allow the plaintiff's personal interest to enter into the weighing or balancing process.").

In summary, the FBI procedures here are adequate for denying nonconsensual third party requests where the requester shows no identifiable public interest in disclosure. Requiring the FBI to process such requests in accordance with *Vaughn*-type procedures would jeopardize the privacy and investigatory interests that the FOIA is designed to protect.

Accordingly, the district court's judgment denying the FBI's motion for summary judgment with respect to the eight counts of the complaint is reversed.

REVERSED

John DOE and Richard Roe, on their own behalf and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

Jim EDGAR, Secretary of State, State of Illinois, Defendant-Appellee.

No. 83-1197.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 15, 1983.

Decided Nov. 22, 1983.

Motorists convicted at least twice of driving while under the influence of alcohol brought suit under Civil Rights Act, seeking declaratory and injunctive relief against a license reinstatement policy adopted by the Illinois Secretary of State. The United States District Court for the Northern District of Illinois, John F. Grady, J., 562 F.Supp. 66, dismissed suit, and an appeal was taken. The Court of Appeals, Pell, Circuit Judge, held that equal protection and due process rights of motorists who had

ically, I conclude that in terms of both time and space, more than 85% of the use of said property was substantially devoted to the exercise or performance by the Foundation of the said educational function. Treas. Reg. 1.514(b)-1(b)(1)(ii).

ORDER

It is ordered that judgment be entered granting plaintiff the relief sought in its complaint. Counsel for plaintiff are directed to submit a proposed form of judgment not later than April 23, 1982.

Michael C. ANTONELLI, Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.

No. 79 C 1432.

United States District Court, N. D. Illinois, E. D.

April 6, 1982.

Freedom of Information Act suit was brought seeking documents from the FBI concerning defendant and several third parties. Cross motions for summary judgment were filed. The District Court, Marshall, J., held that: (1) Privacy Act does not bar an agency from confirming or denying existence of third-party files without authorization of the third parties; (2) agency affidavit asserting that admitting existence of files would constitute clearly unwarranted invasion of personal privacy was an insufficient claim of exemption; (3) request for materials bearing criminal docket numbers was insufficient; and (4) privacy interests outweighed disclosure of certain materials.

Motions granted in part and denied in part.

1. Records ⇐65

Agency has burden of sustaining its claim of exemption from disclosure requirements of Freedom of Information Act. 5 U.S.C.A. § 552(b).

2 Records ⇐53

Exemptions from disclosure requirements of Freedom of Information Act are to be narrowly construed to further the policy of disclosure which is at the heart of the statute. 5 U.S.C.A. § 552(b).

3. Records ⇐66

In conducting a de novo review of documents claimed exempt from disclosure requirements of Freedom of Information Act, the district court has discretion to conduct an in camera review if the public record does not provide a sufficient basis for analyzing the claimed exemption. 5 U.S.C.A. § 552(a)(4)(B), (b).

4. Records ⇐66

In certain limited situations involving sensitive issues of national security agency affidavits claiming exemption from disclosure requirements of Freedom of Information Act themselves may be filed in camera. 5 U.S.C.A. § 552(a)(4)(B), (b).

5. Records ⇐63

General rule is that agency affidavits in support of exemptions from disclosure requirement of Freedom of Information Act must be filed publicly and the opposing party given the opportunity to criticize and contest the claimed exemptions. 5 U.S.C.A. § 552(a)(4)(B), (b).

6. Records ⇐31

Privacy Act was passed in part to promote greater respect for the privacy of citizens by government and prohibit unnecessary and excessive exchange of personal information within the government and to outside individuals. 5 U.S.C.A. § 552a.

7. Records ⇐31

Privacy Act was not intended to override Freedom of Information Act and, in operation, the former only prohibits release of information not covered by the FOIA or

the discretionary release of material which, while exempt from FOIA, the agency might have previously chosen to release. 5 U.S.C.A. §§ 552(b), 552a.

8. Records ⇐53

If request is made of an agency under Freedom of Information Act, disclosure is mandatory unless one of the enumerated exemptions applies. 5 U.S.C.A. §§ 552, 552(b).

9. Records ⇐62

Privacy Act did not prohibit FBI from searching its files under the names submitted by plaintiff absent prior written authorization of the named individuals and did not prohibit agency from acknowledging whether requested files existed; only way agency could resist plaintiff's Freedom of Information Act requests was to rely on one of the enumerated exemptions and meet the burden of establishing that the exemption applied to those records. 5 U.S.C.A. §§ 552(b), 552a.

10. Records ⇐63

Exemption requirement of Freedom of Information Act was not satisfied by agent's affidavit asserting that admitting existence of an FBI file alone would constitute an unwarranted invasion of personal privacy, but, rather, as regards particular documents, agency was to describe the withheld documents and justifications for nondisclosure with reasonably specific detail and demonstrate that the information withheld logically fell within the claimed exemption. 5 U.S.C.A. § 552(b)(6), (b)(7)(C).

11. Records ⇐63

Before district court may entertain a Freedom of Information Act suit, the plaintiff must exhaust available administrative procedures, and such procedures include providing the agency with an initial FOIA request. 5 U.S.C.A. §§ 552, 552(a)(6)(C).

12. Records ⇐63

Where agency's responses to Freedom of Information Act requests, where any response was produced, all came after the statutory ten-day time period, plaintiff's obligation to exhaust administrative remedies was waived. 5 U.S.C.A. § 552(a)(6)(A)(i), (a)(6)(C).

13. Records ⇐63

Although pro se Freedom of Information Act plaintiff did not submit affidavits to overcome agency affidavit that no FOIA requests by plaintiff were discovered, for purpose of dismissal the court considered plaintiff's signature on the complaint as a verification of authenticity of the facts alleged therein. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.; 5 U.S.C.A. § 552.

14. Federal Civil Procedure ⇐2547

On cross motions for summary judgment the court must construe factual issues most favorable to the opposing party.

15. Records ⇐67

Where Freedom of Information Act plaintiff asserted that he mailed request for a document and notice of agency appeal while defendants asserted that they never received them, since defendants received copy of requests on service of complaint the court granted defendants' motion to dismiss but treated service of complaint as official request for release of subject information and if in ten-day statutory period from date of opinion the agency did not comply plaintiff could file administrative appeal and if he was not satisfied with disposition he could again initiate suit to compel disclosure. 5 U.S.C.A. § 552(a)(6)(A)(i), (a)(6)(C).

16. Records ⇐62

Freedom of Information Act request for material in connection with "case number 74 CR 806" was insufficient where FBI does not index files or materials by criminal docket numbers and had no way to trace the material sought. 5 U.S.C.A. § 552.

17. Records ⇐67

Where plaintiff failed to establish that he sought release of FBI documents in the general public interest as opposed to his own private use he failed to meet the standards for requiring waiver of 10¢ per page copying fee. 5 U.S.C.A. § 552(a)(4)(A).

18. Records ⇐58, 60

FBI files fell within exemption from disclosure requirements of Freedom of In-

formation Act for investigatory files and files involving matters of personal privacy where claimed exemptions related to named individuals, either FBI or other agents of government, sources during course of criminal investigations or third parties whose names came up during course of criminal investigations and plaintiff's desire for the documents stemmed from his belief that the material was relevant to proving that he was wrongly convicted. 5 U.S.C.A. § 552(b)(6, 7).

19. Records ⇐52, 62

A plaintiff need not assert any reason at all to require an agency to comply with a Freedom of Information Act request for documents which are not protected by an exemption, but once exemption is claimed general public interest in release becomes relevant. 5 U.S.C.A. §§ 552, 552(b).

20. Records ⇐66

Decision to conduct an in camera review of documents in a Freedom of Information Act suit is discretionary. 5 U.S.C.A. § 552(a)(4)(B).

Michael C. Antonelli, pro se.

Dan K. Webb, U. S. Atty., James P. White, Asst. U. S. Atty., Chicago, Ill., for defendants.

MEMORANDUM OPINION

MARSHALL, District Judge.

In this thirty-seven count complaint plaintiff Michael C. Antonelli seeks information from the Federal Bureau of Investigation ("FBI") concerning himself and several third parties under the Freedom of Information Act, 5 U.S.C. § 552 (1976) ("FOIA").[1] Defendants have moved for summary judgment on twenty of the counts. The summary judgment motion can be dealt with most effectively by breaking it down into six subparts: on seven counts defendants refuse to confirm or deny the existence of any files concerning the subjects of the inquiries, relying on the privacy interests of the third parties;[2] on four counts defendants allege that a search of the central files of the FBI failed to reveal any request for the information by the plaintiff and therefore no further search was conducted[3]; on one count defendants admit receiving plaintiff's request and the written consent of the subject of the inquiry but allege that there are "doubts about the authenticity" of the consent and that it has now been revoked and accordingly, refuse any production[4]; on one count defendants allege that a search was conducted and no files were found under the name submitted by the plaintiff[5]; and on another count defendants allege that they are unable to conduct a search because the request by the plaintiff does not correspond to any classification index used by the FBI.[6] Defendants have produced a substantial amount of material pursuant to all or part of five of plaintiff's requests, but plaintiff challenges the sufficiency of the production and the exemptions relied on by the FBI in deleting portions of the docu-

1. Complaint No. 79 C 1432 was originally brought solely to challenge defendants' refusal to produce documents relating to plaintiff, Michael C. Antonelli. Subsequently plaintiff instituted thirty-six separate lawsuits against the same defendants challenging their refusal to release other documents. The cases were later consolidated into the earliest numbered case, forming the thirty-seven count complaint now before the court.

2. Counts 2 (Peter Gushi); 3 (Raymond Theodore); 7 (Cologna Joseph Ravana); 8 (William Anthony Marzano); 19 (James Dvornick); 30 (Roger Markaty); 31 (Roy Robert Bridges); 33 (John Rocco Cartalino).

3. Counts 15 (Bernard Brody); 25 (Robert Faust); 26 (John Haberkorn); 28 (James Lewis Kaplan).

4. Count 7 (Joseph Ravana).

5. The portion of count 36 relating to Ray Miller.

6. Count 13 (requesting information on "74 CR 806").

ments.[7] Finally, defendants have offered to produce the requested material for two counts of the complaint if plaintiff tenders the 10¢ per page copying fee, or plaintiff's representatives can examine the material free of charge in the FOIA reading room at the FBI headquarters in Washington, D. C.[8] Plaintiff has responded with a cross motion for summary judgment asserting that defendants' response to the complaint is generally inadequate.

The purpose and function of the FOIA are, by now, well known in this circuit and the court sees no need to review them in detail here. *See Stein v. Department of Justice and Federal Bureau of Investigation*, 662 F.2d 1245 (7th Cir. 1981); *Miller v. Bell*, 661 F.2d 623 (7th Cir. 1981); *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980); *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978), *cert. denied*, 440 U.S. 964, 99 S.Ct. 1511, 59 L.Ed.2d 778 (1979); *Marcucia v. Levi*, 569 F.2d 1000 (7th Cir. 1977). *See also Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

[1–5] The Act requires that an initial request to the agency for the release of information be acted upon in ten days and that any denial of release may be administratively appealed and the appeal decided within twenty days. 5 U.S.C. § 552(a)(6)(A)(i) and (ii). *See generally Stein*, 662 F.2d at 1252. In order to withhold information requested the agency must rely on the specific exemptions set out in § 552(b) of the Act. The agency has the burden of sustaining its claim of exemption and the exemptions are to be narrowly construed in order to further the policy of disclosure which is at the heart of the statute. *Department of Air Force v. Rose*, 425 U.S. 352, 360–70, 96 S.Ct. 1592, 1598–08, 48 L.Ed.2d 11 (1976); *Vaughn v. Rosen*, 484 F.2d at 823; *Soucie v. David*, 448 F.2d 1067, 1080 (D.C.Cir.1971). This burden can be met if the agency submits affidavits that (1) describe the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically within the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of agency bad faith. *Military Audit Project v. Casey*, 656 F.2d 724 (1981); *Lesar v. Dep't. of Justice*, 636 F.2d 472 (D.C.Cir.1980); *Hayden v. National Security Agency/Central Security Serv.*, 608 F.2d 1381 (D.C.Cir.1979), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980); *Terkel v. Kelly*, 599 F.2d 214. *Stein v. Dep't. of Justice and FBI*, 662 F.2d at 1253.

In conducting its *de novo* review the district court has discretion to conduct an *in camera* review of the documents if the public record does not provide a sufficient basis for analyzing the claimed exemption. 5 U.S.C. § 552(a)(4)(B). *See Stein*, 662 F.2d at 1253. In certain limited situations involving sensitive issues of national security the affidavits themselves may be filed *in camera*, *see Phillipi v. Central Intelligence Agency*, 546 F.2d 1009, 1011–13 (D.C.Cir.1976); *Hayden v. National Security Agency/Central Security Service*, 608 F.2d at 1384–86, but the general rule is that the affidavits must be filed publicly and the opposing party given the opportunity to criticize and contest the claimed exemptions. *Id.*

While the contours of the specific exemptions in § 552(b) are still being shaped and application of the exemptions to particular facts is often hotly contested, the procedures used as outlined above are well settled. In light of those procedures we find defendants' response to counts 2, 3, 8, 19, 30, 31 and 33 incredible. Defendants have not only refused to turn over any documents to the plaintiff pursuant to these counts, they have refused to confirm or deny the existence of any of the requested

7. Counts 6 (James Catuara); 10 (William Joseph Lynch); 17 (Pasquale Charles Marzano); 36 (Janet Lynn Kraas).

8. Counts 11 (Richard J. Daley) and 13 (Patricia Hearst).

files and have provided the court and the plaintiff absolutely no information on which to base a judgment of whether the requested material is exempt from the FOIA. While they have cited no case authority in support of their position, defendants rely principally on the Privacy Act, 5 U.S.C. § 552a (1976) for the proposition that absent written authorization from the subject of the inquiry they are prohibited from even acknowledging whether the requested files exist. Additionally, defendants cite § 552(b)(7)(C) and (D) in defense of the "FBI's [] action in refusing to confirm or deny the existence of records concerning third parties in the absence of their notarized authorizations." Defendants' Reply on Motion for Summary Judgment at 2. Defendants appear to treat these two arguments interchangeably, but we believe they are distinct and we address each separately.

[6] The Privacy Act was passed in 1974 in part to promote greater respect for the privacy of citizens by government and prohibit unnecessary and excessive exchange of personal information within the government and to outside individuals. *See* S.Rep. 93–1183, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.Code Cong. & Admin.News 6916; *see also Florida Medical Ass'n v. Department of Health, Education & Welfare* (HEW), 479 F.Supp. 1291, 1305–07 (M.D. Fla.1979); *Local 2047, American Federation of Government Employees v. Defense General Supply Center*, 423 F.Supp. 481, 483–86 n. 9–10 (E.D.Va.1976).

The FBI's position on the impact of the Privacy Act is set out in the detailed affidavit of agent Donald Smith. (Hereinafter "Smith Aff."). In essence the Bureau is of the opinion that the Privacy Act overrides the FOIA and prohibits the disclosure of any "personal" information about a third party without their notarized authorization. Smith Aff. ¶ 68. Moreover, "[t]he FBI has further advised [plaintiff] that to confirm or deny investigative interest in the individual identified by plaintiff would, of itself, reveal personal information concerning a third party." *Id.*

[7–9] The defendants' position was expressly rejected by Congress in drafting the Privacy Act and, so far as we have been able to discover,* every court that has considered it. The Act itself states:

> (b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, *unless the disclosure of the record would be*—
>
> * * * * * *
>
> (2) *required under section 552 of this title*; 5 U.S.C. § 552a(b)(2) (1976) (emphasis supplied).

Thus, the Privacy Act was not intended to override the FOIA and in operation only prohibits the release of information not covered by the FOIA or the discretionary release of material which, while exempt from the FOIA, the agency might have previously chosen to release. *See Providence Journal Co. F.B.I.*, 460 F.Supp. 762, 767 (D.R.I. 1978). If a request is made of an agency under the FOIA, disclosure is mandatory unless one of the enumerated exemptions applies. *See Florida Medical Association v. HEW*, 470 F.Supp. at 1306 ("Thus, since the Privacy Act expressly defers to the mandatory disclosure provisions of the FOIA, . . . , information which is not exempt under Exemption 6 from disclosure would receive no Privacy Act protection."). *See also Brown v. FBI*, No. 79 CV 767, slip op. at 10 (N.D.N.Y.1981) ("In considering the federal Privacy Act disclosure exemptions alone, it is apparent that plaintiff is barred under it from obtaining the records requested *unless disclosure is required under the FOIA*. . . . Since disclosure may be warranted under the FOIA, as provided for in 5 U.S.C. § 552, the Court must examine the FOIA exemptions to determine whether the[y] are applicable here.") (emphasis supplied), *aff'd*, 658 F.2d 71, 76 (2d Cir. 1981) ("[T]he decision to

* Plaintiff's pro se submissions are of scant help in the research which attends this decision.

disclose or withhold the requested information depends entirely on the interpretation and applications of the claimed [FOIA] exemptions."); *Providence Journal Co. v. F.B.I.*, 460 F.Supp. 762, 767 (D.R.I.1978) ("Thus an agency which is required to disclose material under FOIA (that is material not covered by a FOIA exemption) can release it without bringing into play the requirement of § 552a(b) that permission first be obtained."). The position of the defendants in this litigation that they are prohibited by the Privacy Act from even searching for files under the names submitted by plaintiff absent prior written authorization is clearly erroneous. The only way defendants can resist plaintiff's FOIA requests is to rely on one of the enumerated exemptions in the Act and meet their burden of establishing that the exemption applies to those records. Defendants have failed to meet their burden in this case.[9]

In their brief and the affidavit of agent Smith defendants rely on the exemptions provided by § 552(b)(6), (7)(C) and (7)(D). Those provisions permit the agency to withhold "personnel and medical files and similar files" and/or "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records" constitutes a "clearly unwarranted invasion of personal privacy" or would disclose the identity of a confidential source.[10] Smith Aff. ¶¶ 71, 74–79. Defendants do not, however, apply the exemptions to particular files because, as we indicated earlier, they have refused to search for the files requested without prior written authorization from the third party. Instead, defendants argue in the hypothetical;

> *If* investigative files concerning these individuals are to be found within FBI systems of records, they would be compiled during the course of specific FBI investigations conducted pursuant to various federal statutes.... As such, they would constitute "investigatory records compiled for law enforcement purposes" within the meaning of the (b)(7) exemption of the FOIA.... Should it be determined that documents concerning certain individuals exist in personnel or medical files or files of a similar nature being maintained by the FBI, such documents would be withholdable pursuant to the (b)(6) exemption of the FOIA. Smith Aff. ¶ 71 (emphasis supplied).

In defense of that position agent Smith asserts

> The inference drawn from the fact that an individual was the subject of an FBI investigation is the FBI's belief that the individual was engaged in some conduct which is in violation of some criminal or civil statute, rule or regulation or that

9. *See Stein*, 662 F.2d at 1253; 5 U.S.C. § 552(a)(4)(B).

Plaintiff's response to the position taken by the defendants here is that the records requested are "public records" because the individuals he is requesting information about were either convicted of crimes, were witnesses at criminal trials, or are employees of the United States and "officers of the court." By this opinion we do not accept plaintiff's characterizations. Our holding is limited to requiring the defendants to make a search of their records pursuant to the FOIA, disclose any documents which are not exempt, and assert any claimed exemptions with particularity. We do not in any way prejudge the validity of exemptions which defendants may or may not choose to rely on in making the required production.

10. The exemption provision of the statute provides in relevant part:

> (b) This section does not apply to matters that are—
>
> * * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. 5 U.S.C. § 552(b) (1976).

> the individual was engaged in some activity which may have been detrimental to the national security of the United States. Such an inference clearly holds the individual up to public speculation and ridicule which can only cause the individual embarrassment, harassment and potential physical harm. Smith Aff. ¶ 74.

In their brief defendants take the position that

> [the] FBI's [ ] action in refusing to confirm or deny the existence of records concerning third parties in the absence of their notarised authorizations, citing the (b)(7)(C) and/or (D) privacy and confidential source exemptions, . . . , has been repeatedly upheld by the U.S. Court of Appeals for the Seventh Circuit. *See Marocsia v. Levi*, 569 F.2d 1000 (7th Cir. 1977); *Terkel v. Kelley*, 599 F.2d 214 (7th Cir. 1979), . . . ; *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978), . . . ; *Miller v. Webster, et al.*, [661 F.2d 623 (7th Cir. 1981)]. Defendants' Reply on Motion for Partial Summary Judgment at 2.

None of the cited cases supports the extreme position taken by defendants in this litigation. In each case the agency involved, usually the FBI, supplied the court and the plaintiff with detailed affidavits describing the nature of the material sought, producing the material for which no exemption applied, and outlining in various degrees of detail, why all or portions of the requested files should be exempt. *See Miller v. Bell*, 661 F.2d at 627 ("Special Agent King's lengthy and detailed affidavit . . . identifies each type of excision and relates them in particular detail to the relevant claimed exemption."); *Terkel v. Kelley*, 599 F.2d at 217 ("[T]he agency has furnished lengthy detailed descriptions of all documents released, the nature of portions excised, the statutory source of the exemptions claim, the reason the exemptions were claimed, and the standards [relied upon]. The affidavit contains a document by document index in which each document is described [and] the deleted portions are outlined as to quantity and general character. . . ."); *Scherer v. Kelley*, 584 F.2d at 175 ("[W]e find that the FBI [and other agencies] all provided the court with a sufficiently detailed means of cross-reference. Those three agencies submitted sworn affidavits which comprehensively set forth the exemptions upon which the agency had relied when it excised portions of its file pertaining to Scherer and set forth the reasons underlying their use."); *Marocsia v. Levi*, 569 F.2d at 1001 ("The files have been produced for our *in camera* inspection and they have been reviewed. The portions asserted to be exempt were marked in red."). Even a cursory reading of those cases indicates that they do not sanction the agency in asserting a blanket refusal to produce documents based on a hypothetical assertion of third party privacy interests. In at least one case the court indicated that withholding entire pages of documents was not justified where deleting identifying material would adequately protect the interests served by the claimed exemption. *See Terkel*, 599 F.2d at 217–218.

[10] The FBI's position here is clearly at odds with the procedures adopted in this and other circuits and violates the requirements of the FOIA. If we were to hold that agent Smith's affidavit asserting that admitting the existence of an FBI file alone constitutes a "clearly unwarranted invasion of personal privacy" without even requiring a description of what the file is about we would be creating a blanket exemption from the FOIA which the FBI could assert at its discretion. The Congress specifically rejected such a broad exemption from the requirements of the act and we decline to permit it to be fashioned here.[11] If defend-

11. The only blanket exemption provided in the original FOIA was for executive invocation of the "classified documents" exemption, 5 U.S.C. § 552(b)(1). *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). The Congress disapproved of the application of the exemption and its interpretation in *Mink* and amended the statute in 1974 to provide for in camera inspection even where the documents are alleged to have national security implications. *See* S.Rep.No. 93-1200, 93rd Cong., 2d Sess. *reprinted in*

ants wish to resist the plaintiff's request for particular documents they must follow the procedure outlined in *Stein* and "(1) describe the withheld documents and the justifications for non-disclosure with reasonably specific detail, [and] (2) demonstrate that the information withheld falls logically within the claimed exemption." 662 F.2d at 1253. Merely stating that if some files exist they would necessarily be exempt in their entirety will not suffice. Defendants' motion for summary judgment on counts 2, 3, 8, 19, 30, and 31 is denied. Defendants are ordered to search for the requested material and produce the documents, identifying any claimed exemptions and the reasons for the exemption with reference to the particular documents, within 30 days.

[11-14] Defendants move to dismiss counts 15, 25, 26 and 28 on the grounds that after a thorough search of the FBI's central file no FOIA requests by plaintiff were discovered for the persons covered by these counts. The affidavit of agent Smith adequately details the FBI search procedure and if uncontroverted would constitute a clear grounds for dismissal. The Act requires that before the district court may entertain an action under the statute plaintiff must exhaust available administrative procedures.[12] Such procedures obviously include providing the agency with an initial FOIA request. However, here the assertions of agent Smith are controverted by plaintiff. Plaintiff has attached to his complaint[13] a copy of an initial request and letter appealing the FBI's failure to produce the requested documents in the statutory ten day period. Plaintiff's Complaint, Count XV, Ex. A, B; Count XXV, Ex. A, B; Count XXVI, Ex. A, B; Count XXVIII, Ex. A, B. On the cross motions for summary judgment we must construe the factual issues in a way most favorable to the opposing party. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). Thus, under normal circumstances, the cross motions for summary judgment would be denied.

[15] However, on the facts of this case, we do not believe conducting a hearing will be helpful in deciding the issue, while it will undoubtably impose a substantial burden on the parties.[14] What we have here is a standoff: plaintiff asserts that he mailed the initial request and the notice of appeal and defendants assert that they never received them. There is no doubt, however, that defendants received a copy of the requests contained in these counts upon service of the complaint in this case. In order to economize what would otherwise be an

[1974] U.S.Code & Admin.News 6267. There has never been a blanket exemption for law enforcement files and exemption (b)(7) on its face requires that the agency withhold only pursuant to one of six enumerated categories. *See* note 9, *supra*.

12. *See* 5 U.S.C. § 552(a)(6)(C). Defendants also press the exhaustion requirement for counts 1, 7, 8, 19, 31 and 33, alleging that plaintiff failed to administratively appeal from an adverse ruling as required by the statute. In the first place, plaintiff has attached to each count of the complaint a letter of administrative appeal addressed to the defendant FBI. Other than the statement in the brief that plaintiff has failed to exhaust, defendants have not controverted the letters which indicate plaintiff has appealed the adverse determination. Moreover the Act provides,

> (C) Any person making a request to an agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. 5 U.S.C. § 552(a)(6)(C).

The applicable time period referred to in that subsection is ten days. See 5 U.S.C. § 552(a)(6)(A)(i). Defendants' responses to plaintiff's requests, where any response has been produced, all came after the statutory time period and therefore plaintiff's obligation to exhaust his administrative remedies is waived. *See* Complaint count 1, Ex. A-E; count 7, Ex. A-C; count 8, Ex. A-C; count 19, Ex. A, B; count 31, Ex. A, C; count 33, Ex. A, B.

13. Plaintiff is proceeding in this action *pro se* and, although he has not submitted affidavits, by signing the complaint we construe him to have verified the authenticity of the facts alleged therein. *See* Fed.R.Civ.P. 11.

14. Plaintiff is currently a prisoner in custody at the federal penitentiary at Terre Haute, Indiana.

unnecessarily long and unhelpful process, we will grant defendants' motion to dismiss these counts but treat service of the complaint as an official request under the FOIA for release of the information requested. If in the ten day statutory period from the date of this opinion defendants do not comply with the request, plaintiff may file an administrative appeal on which he is entitled to a ruling in twenty days. If plaintiff is not satisfied with the disposition of his request he may again initiate suit to compel disclosure and we will consolidate that suit with the remaining portions of the case currently before us.[15] With the above understanding, defendants' motion to dismiss counts 15, 25, 26 and 28 is granted without prejudice.

[16, 17] Defendants' motion to dismiss with respect to counts 11, 13, 16, and the portion of 36 dealing with Ray Miller is well founded. Count 13 requests material in connection with "case number 74 CR 806." The affidavit of agent Smith adequately explains that the FBI does not index files or materials by criminal docket numbers and therefore has no way to trace the material sought. Smith Aff. ¶ 82. With respect to Ray Miller the affidavit of agent Smith that a search of the general indices of the central records system of the FBI has failed to reveal any file under the name identified is dispositive. Smith Aff. ¶ 80. Defendants can do no more than search their files and they cannot turn over what they do not have. Finally defendants' assertion by way of affidavit that they are ready to turn over the files requested on Patricia Hearst and the late Mayor Richard Daley if plaintiff pays the 10¢ per page copying fee is dispositive of counts 11 and 16. Smith Aff. ¶ 83; Affidavit of Agent Sherry Davis ¶ 1–11 (hereinafter "Davis Aff."). Plaintiff's request to receive the documents free of charge was denied pursuant to statute and applicable regulations. *See* Davis Aff. ¶ 9–11, Ex. F, G; 5 U.S.C. § 552(a)(4)(A) and 28 C.F.R. ¶ 16.9(a), (b). We agree with defendants that plaintiff has failed to establish that he seeks release of these documents in the general public interest as opposed to his own private use and he therefore fails to meet the standards for requiring a fee waiver. *Id.* Accordingly, counts 11, 13, 16 and the portion of count 36 identified above are dismissed.

[18, 19] With respect to counts 6, 10, 17 and the remainder of count 36, defendants have produced and turned over to plaintiff a substantial amount of material. That material contains literally thousands of pages of documents, supported by affidavits from four FBI agents containing specific explanations for each exemption claimed and detailed indices of how the exemptions correspond to the documents. *See* Davis Aff., Ex. 7 ¶ 19–20, ex. EE; Affidavit of Agent Francis Garret, Ex. 8 ¶ 20–22, ex. O (the Garret affidavit explains the exemptions claimed on a cover page to each document produced rather than by way of a general index); Affidavit of Agent Walter Scheuplein, Ex. 9 ¶ 8, ex. L; Affidavit of Agent Douglas Ogden, Ex. 10, ¶ 5–6 (this affidavit also asserts the claimed exemptions by way of a cover page to each document disclosed rather than by way of a general index). We have reviewed the affidavits submitted and selectively viewed the documents submitted to plaintiff and we find that the affidavits are sufficient to establish the applicability of the § 552(b)(6) and (b)(7) exemptions claimed by defendants. In balancing the individuals' rights to privacy against the public interest in the disclosure sought here we believe the privacy interests asserted have the better of it. All of claimed exemptions relate to protections of named individuals; either FBI or other agents of government, sources during the course of criminal investigations, or third parties whose names came up during the course of criminal investigations. Plaintiff's desire for the documents apparently stems from his belief that all or part

15. By previous order we have dismissed counts 4, 12, 20, 21, 23, 34, and 37. Our order of March 23 apparently inadvertently included counts 24 and 27 rather than 34 and 37. Accordingly, we amend that order to reflect dismissal of the later numbered counts. As we understand it, counts 34 and 27 are then still at issue in this case.

of the material is relevant to his proving that he was wrongly convicted of criminal activity.[16] While plaintiff need not assert any reason at all to require the agency to comply with his FOIA requests for documents which are not protected by an exemption, once an exemption is claimed the general public interest in release becomes relevant. *See Department of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1976); *Miller v. Bell*, 661 F.2d at 828–31. On the facts of this case, we hold that the privacy interests prevail and disclosure would be unwarranted.

[20] Plaintiff additionally contends that the Vaughn affidavits supplied him are vague and ambiguous. To the contrary, we find the affidavits more than sufficient to meet the requirements of *Vaughn* and its progeny. *See Stein v. Dept. of Justice and FBI*, 662 F.2d at 1260; *Baez v. Dept. of Justice*, 647 F.2d 1328 (D.C.Cir.1980); *Lesar v. Dept. of Justice*, 636 F.2d 472 (D.C.Cir. 1980); *Nix v. United States*, 572 F.2d 998 (4th Cir. 1978); *Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).[17] Accordingly, defendants' motion to dismiss with respect to counts 6, 10, 17 and 36 is granted.

Count 1 of plaintiff's complaint requests all documents under plaintiff's name. Defendants, for some reason the court has been unable to ascertain, treat this as a request for information on someone named Cologero Ravana. See Defendants' Motion for Partial Summary Judgment ¶ 9. The complaint contains plaintiff's original request for information, defendants' acknowledgement of the request, and plaintiff's appeal following defendants' failure to produce the requested material. Complaint count 1, ex. A–C. Defendants' reply to this request is unresponsive and plaintiff's motion for summary judgment on count 1 is therefore granted. Defendants to produce all material in their files relating to Michael Carmie Antonelli within the statutorily mandated period of ten days.

Finally, plaintiff has moved to dismiss without prejudice counts 18, 22, 29 and 32 of the complaint. The defendant has offered no objection and therefore those counts are dismissed without prejudice.

In summary, defendants' motion for summary judgment and plaintiff's cross motion for summary judgment are granted in part and denied in part. Counts 6, 10, 11, 13, 16, 17 and 36 are dismissed with prejudice. Counts 15, 25, 26 and 28 are dismissed without prejudice, and plaintiff is granted leave to reinstate if dissatisfied with defendants' response to the requests contained therein after production or denial and administrative appeal. Counts 18, 22, 29, and 32 are dismissed without prejudice. Defendants are ordered to respond to the requests in counts 2, 3, 7, 8, 19, 30, 31 and 33 by producing non-exempt documents and asserting with particularity any claimed exemptions within 30 days.[18] Plaintiff is granted summary judgment on count 1 and defendants are ordered to produce all documents requested in that count within ten days from the date of this order.

16. *See* Plaintiff's Answer to Motion for Partial Summary Judgment at 2.

17. Plaintiff alternatively requests that this court conduct an *in camera* examination of the document submitted to him to determine if the exemptions are properly claimed. The decision to conduct *in camera* review is discretionary. *See* 5 U.S.C. § 552(a)(4)(B); S.Rep. 93–1200, 93rd Cong., 2d Sess., *reprinted in* U.S.Code Cong. & Admin.News 6267, 6287. We believe the affidavits and indices provided by the defendants are adequate to establish the grounds for the claimed exemptions and therefore decline to exercise our discretion.

18. In response to count 7, not previously discussed, defendants allege that there is doubt about the authenticity of the consent forwarded by the plaintiff. Because, as we have discussed above, plaintiff is not obliged to forward the consent of the subjects of the inquiry when making a FOIA request, and plaintiff acknowledges receiving the request at issue in count 7, we include this count in the group which defendants are ordered to respond to in 30 days.

E.E.O.C.'s silence throughout the eighteen month period in which Houghton's damages, attorney's fees and costs were calculated was unexcusable and prejudicial to the Court and defendant. *Houghton v. McDonnell Douglas Corp.*, No. 73 C 14(1), slip op. (E.D.Mo. August 2, 1982). Regardless of the E.E.O.C.'s alleged compliance with Local Rule 24, the Court reaffirms its finding that the E.E.O.C.'s failure to participate in the resolution of attorney's fees and costs between the November 12, 1980 mandate of the Eighth Circuit Court of Appeals and this Court's June 18, 1982 Order determining attorney's fees and costs constituted laches and bars the E.E.O.C.'s petition for costs.

The E.E.O.C.'s interest in this case centered on the bona fide occupational qualification issue. That issue was, for all intents and purposes, resolved by the Eighth Circuit Court of Appeals in the *Houghton II* mandate. Eighteen months elapsed between the E.E.O.C.'s receipt of the *Houghton II* mandate and the entry of final judgment by this Court as to Houghton's damages and the costs and attorney's fees generated by this lawsuit. The E.E.O.C. was notified of the attorney's fees and costs proceedings, yet, chose not to participate. The E.E.O.C. never hinted to the Court or the parties that it had any interest in costs even though the Court had indicated in its memoranda that the E.E.O.C.'s assistance would be welcomed. The parties submitted extensive memoranda on the costs and attorney's fees issues—all without the assistance of the E.E.O.C. Ultimately, defendant settled the attorney's fees and costs issues with plaintiff. Defendant was certainly entitled to believe that settlement with plaintiff would completely dispose of this litigation. The E.E.O.C.'s tardy request for costs is prejudicial to defendant and fundamentally unfair.

The Court has presided over this protracted lawsuit and believes it is in the best position to weigh the equities of the participants' actions. In the instant matter, the Court is convinced that the E.E.O.C. has waived any right it may have had to costs. To permit the E.E.O.C. to petition for costs at this date would be prejudicial to defendant, unfair to the Court and would set an unhealthy precedent as to the construction of Local Rule 24. Accordingly,

IT IS HEREBY ORDERED that the motion of the Equal Employment Opportunity Commission to consider denial of costs be and is DENIED.

Michael C. ANTONELLI, Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al., Defendant.

No. 79 C 1432.

United States District Court,
N.D. Illinois, E.D.

Aug. 11, 1982.

Freedom of Information Act suit was brought seeking documents from the FBI concerning third parties. The FBI was ordered to respond, 536 F.Supp. 568, and it appealed. On the FBI's motion for a stay pending appeal, the District Court, Prentice H. Marshall, J., held that stay pending appeal would be granted where Second Circuit Court of Appeals' decisions concerning interface between Privacy Act and Freedom of Information Act were cryptic and it was possible that Court of Appeals would wish to reexamine its position.

Motion granted.

1. Federal Courts ⇐684

Factors to be considered on request for stay pending appeal are whether appellant has made showing of likelihood of success on appeal, whether appellant has demonstrated likelihood of irreparable injury absent stay, whether stay would substantially

harm other parties to litigation, and where public interest lies.

2. Records ⇐21, 55

Exemptions from disclosure under Privacy Act do not qualify as specific exemptions from disclosure by statute under Freedom of Information Act; enumerated exemptions contained in Freedom of Information Act must be relied on in withholding documents requested by member of public under that Act. 5 U.S.C.A. §§ 552(b)(3), 552a(b), (j)(2).

3. Federal Courts ⇐686

Request of Federal Bureau of Investigation for stay pending appeal of an order requiring it to respond to third party's request for information under Freedom of Information Act would be granted where Second Circuit Court of Appeals' decisions concerning interface between Privacy Act and Freedom of Information Act were cryptic and it was possible that Court of Appeals would wish to reexamine its position and where stay was appropriate because Bureau's position could be mooted if it was compelled to respond to request prior to appeal. 5 U.S.C.A. §§ 552(b)(3), 552a(b), (j)(2).

Michael C. Antonelli, pro se.

James P. White, Asst. U.S. Atty., Dan K. Webb, U.S. Atty., Chicago, Ill., for defendant.

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge.

This case comes to us on the motion of the defendants, the Federal Bureau of Investigation ("FBI") and Department of Justice, for a stay pending appeal of our order issued April 6, 1982. *See Antonelli v. Federal Bureau of Investigation*, 536 F.Supp. 568 (N.D.Ill.1982). Plaintiff's complaint is a consolidation of thirty-six separate suits brought by plaintiff against the FBI for failure to respond to requests brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1976). In our opinion of April 6 we granted defendants' motion for summary judgment with respect to counts 6, 10, 11, 13, 16, 17 and 36. We also granted defendants' motions for summary judgment as to counts 15, 25, 26 and 28, but without prejudice, and permitted plaintiff to voluntarily dismiss counts 18, 22, 29 and 32. We granted plaintiff's cross motion for summary judgment on count 1. Finally, with respect to counts 2, 3, 7, 8, 19, 30 and 31 we denied both motions for summary judgment and ordered defendant to respond by citing any exemptions under the FOIA within thirty days. Defendants now seek a stay for purposes of appeal only with respect to the last group of claims.

[1] The factors to be considered on a request for a stay pending appeal are (1) whether appellant has made a showing of likelihood of success on appeal, (2) whether appellant has demonstrated a likelihood of irreparable injury absent a stay, (3) whether a stay would substantially harm other parties to the litigation and (4) where the public interest lies. *Adams v. Walker*, 488 F.2d 1064 (7th Cir.1973) (citing *Miltenberger v. Chesapeake & Ohio Railroad*, 450 F.2d 971, 974 (4th Cir.1971)).

The government has cited new authority in support of its motion. *See* Defendants' Motion for Stay Pending Appeal ¶ 4. Furthermore, we have discovered significant additional authority on the questions at issue here which the government did not cite but which we believe warrants examination in the context of this case. In light of that authority, and the fact that appellants' likelihood of success on appeal is of prime import in determining whether a stay should be granted, *see Adams v. Walker*, 488 F.2d at 1065, we take this opportunity to offer some supplemental discussion on that portion of the opinion challenged by the government. We turn first, therefore, to defendants' likelihood of success on the merits of the appeal.

The motion for summary judgment and affidavits submitted by the FBI agents in support of the motion cited § 552a(b) of the Privacy Act, 5 U.S.C. § 552a (1976), as a

rationale for refusing to respond to plaintiff's FOIA requests. However, in the legal memorandum submitted by the government there was not a mention of the Privacy Act. Instead it relied entirely on the privacy and law enforcement exemptions contained in the FOIA itself. 5 U.S.C. §§ 552(b)(6) and (b)(7). *See* Defendants' Reply Memorandum ¶ 2.[1] We rejected the government's contention that the FOIA exemption justified the FBI's refusal to even search their files for the requested material before denying plaintiff's search request. *See* 536 F.Supp. at 573–75.[2] In addition we felt

1. Defendants also raised the issue of exhaustion of administrative remedies which we addressed in our original opinion. *See* 536 F.Supp. at 575 n. 12.

2. In their motion for a stay defendants call the court's attention to the decision in *Rushford v. Civiletti*, 485 F.Supp. 477 (D.D.C.1980), *aff'd*, 656 F.2d 900 (D.C.Cir.1981) as additional authority in support of their position that the FOIA itself, rather than the Privacy Act, justifies their position in this case.

In *Rushford* plaintiff's request for files from the FBI relating to criminal investigations of federal judges which had not resulted in charges being brought against those judges were held to be exempt under § (b)(7)(C) as an unwarranted invasion of personal privacy. The court focused on the particular susceptibility of members of the federal bench to adverse impact from disclosure that they had been investigated by the FBI, even though nothing had been found which warranted prosecution. *Id.* at 479. The court declined to engage in individual inspection of the files before conducting the balancing required under *Dep't of Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976).

> Plaintiff suggests that the balancing of the various interests must be done on an individual, factual basis, and that a decision cannot be made as a matter of law by way of a motion for summary judgment. But there is no genuine dispute on the only material facts—that the Department of Justice is maintaining files on complaints of judicial misconduct and that release of information is likely to be embarrassing to the individuals involved, both in their personal and professional capacities. The development of a factual record is unnecessary and inappropriate when it may properly be determined that, for reasons applicable generally, and without regard to particular circumstances, the privacy interest sought to be protected outweighs the interest in revelation asserted by the particular plaintiff.

Rushford, 485 F.Supp. at 480–81 (footnotes omitted).

Regardless of whether we believe the court was correct in refusing to inspect the withheld files before deciding if they were exempt, the instant case is substantially different from *Rushford*. In *Rushford* the court was at least aware that it was dealing with a particular type of file which contained a particular type of information. Here, we have no such information because the FBI refuses to provide it. Relying, we assume on its interpretation of the Privacy Act, the Bureau refused to inform the plaintiff or the court whether any files of any type exist on the requested individuals. The affidavits submitted addressing the privacy interests were phrased entirely in the hypothetical. Rather than indicating the type of information and why it is exempt, the FBI simply said *if* it had any information, all of it would be exempt. *See Antonelli*, 536 F.Supp. at 573. We continue to believe that if the FBI's position were adopted it would be tantamount to granting the Bureau a *per se* exemption from the FOIA without judicial oversight designed to balance the interest in public disclosure against "unwarranted invasions of personal privacy." Neither *Rushford* nor the cases it relied on warrant such a result. In each of the cases relied on in *Rushford* where withholding of documents was permitted under § (b)(7)(C) the court was either provided with the withheld documents or received affidavits detailing the nature of the documents and why they should not be released. *See Fund for Constitutional Government v. National Archives and Records Service*, 485 F.Supp. 1 (D.D.C.1978); *Cerveny v. Central Intelligence Agency*, 445 F.Supp. 772 (D.Colo.1978); *Tax Reform Research Group v. Internal Revenue Service*, 419 F.Supp. 415 (D.D.C.1976). With respect to the counts upon which the government appeals, we received no such documents or information.

Nor can we conclude as did the court in *Rushford* that the privacy interests involved and the weight attached to those interests, is the same for all of the material requested by plaintiff. *Rushford* recognized that individuals in different situations may have different privacy interests at stake depending on the type of information requested. *See* 485 F.Supp. at 480 n. 11. In particular it has been recognized that individuals who have been prosecuted and convicted of federal crimes may have a lesser privacy interest in the "routine" material contained in an FBI file. *See Tennessean Newspaper, Inc. v. Levi*, 403 F.Supp. 1318 (M.D.Tenn. 1975). Plaintiff asserted in his papers, and defendant has not denied, that several of the individuals about whom he has requested information have been prosecuted and convicted for federal crimes. While we do not believe that people so convicted lose their right to privacy, it is possible that privacy interests lessen where one has been prosecuted for an offense in open court, and we do not believe that it is

compelled, despite the government's failure to argue the point, to deal with the Privacy Act issue presented in the motion for summary judgment. *See id.* at 571–73. In light of the new authority which has come to our attention, we review our conclusions below.

The Court of Appeals for the District of Columbia Circuit recently considered in depth the interface between the FOIA and the Privacy Act in *Greentree v. United States Customs Service*, 674 F.2d 74 (D.C. Cir.1982). The court discussed at length the question whether the Privacy Act operates to override the FOIA and permit the withholding of documents based solely on the Privacy Act. *Id.* at 76–85. The precise question in *Greentree* is somewhat different than the case at bar. There, the court addressed whether a first party request for information was exempt from disclosure by virtue of the law enforcement exemption contained in 5 U.S.C. § 552a(j)(2) without reference to the FOIA. *Id.* at 75. The question turned, in brief, on whether 552a(j)(2) qualifies as a specific exemption from disclosure by statute which entitles the government to resist disclosure under the FOIA. *See* 5 U.S.C. § 552(b)(3). If the Privacy Act section relied on by the government is such a specific exemption from the FOIA, then the question would turn solely on whether the plaintiff has a right to the information under the Privacy Act. *Greentree* held that § 552a(j)(2) was not a "specific exemption" and therefore the FOIA would have to be considered before disclosure could be successfully resisted. *See* 674 F.2d at 76–81.

In the case at bar we are confronted with a third party's request for information concerning another person and the specific issue, while related, is whether § 552a(b) constitutes an exemption from the FOIA's duty to disclose the material, absent a signed release from the subject of the inquiry. In our April 6 opinion we relied on section (b)(2) and held that the Privacy Act does not operate as an exemption from disclosure under the FOIA:

> (b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to a person or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, *unless the disclosure of the record would be*—
>
> . . . . . .
>
> (2) *required under section 552 of the title*[.]

5 U.S.C. § 552a(b)(2) (1976) (emphasis supplied). *See also Brown v. FBI*, No. 79 CV 767 (N.D.N.Y.1981), *aff'd*, 658 F.2d 71 (2d Cir.1981); *Florida Medical Ass'n v. HEW*, 479 F.Supp. 1291 (M.D.Fla.1979); *Providence Journal Co. v. FBI*, 460 F.Supp. 762 (D.R.I.1978).

[2] The court in *Greentree* agreed with that conclusion: "We must conclude, . . . that section (b)(2) of the Privacy Act represents a congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access." 674 F.2d at 79 (emphasis original). In fact, in *Greentree* the government conceded the very question at issue here:

> The government acknowledges that section (b)(2) of the Privacy Act does safeguard FOIA access to the public . . .
>
> . . . . . .
>
> "In the vast majority of cases, a third party would be protected from obtaining access to records about another individual covered by the Privacy Act (particularly if they are law enforcement records) because of the FOIA privacy exemptions (FOIA exemptions 6 and 7(c)). Under the balancing test used to implement these exemptions such an invasion of privacy is permitted only where it is outweighed by a countervailing strong public interest in disclosure. *Dept. of*

an unwarranted invasion of privacy to acknowledge the existence of an FBI file on someone who has been prosecuted for a federal offense. While we do not prejudge the question of whether specific material is covered by § (b)(7)(C), we cannot engage in the required balancing of interest without knowing what is on one side of the balance.

Air Force v. Rose, 425 U.S. 352, 370–76 [96 S.Ct. 1592, 1603–06, 48 L.Ed.2d 11] (1976)."

Id. at 79, 80 (quoting Government's brief at 36 n. 18)). We agree, therefore, with the position taken by the government in *Greentree*, at least with respect to this issue; it is (b)(7) or the other enumerated exemptions contained in the FOIA which must be relied on in withholding documents requested by a member of the public.

The legislative history of the Privacy Act confirms this view. As originally submitted to committee the House bill contained section (b)(2) as it currently reads. *See* H.R. 16373, 93th Cong., 2d Sess. 4–5 (1974), *reprinted in* Senate Comm. on Government Operations, 93th Cong., 2d Sess. Legislative History of the Privacy Act of 1974 242–43 (Comm. Print 1976) (hereinafter cited as "Source Book"). In committee the bill was changed to delete (b)(2) as contained in the original bill. *See id.* at 22, Source Book at 279. The House committee report indicates an intent on the part of the committee to override the FOIA without obtaining prior written consent:

> Section 552a(b) provides that no Federal Agency shall disclose any record containing personal information about an individual without his approval to any person not employed by that agency or to another agency except under certain conditions....
>
> This legislation would have an effect on subsection (b)(6) of the Freedom of Information Act (5 U.S.C. section 552), which states that the provisions regarding disclosure of information to the public shall not apply to material "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." H.R. 16373 would make all individually identifiable information in Government files exempt from public disclosure. Such information could be made available to the public only pursuant to rules published by agencies....

H.R.Rep. No. 1416, 93d Cong., 2d Sess. 12, 13 (1974), *reprinted in* Source Book, *supra* p. 5, at 305–06. This version subsequently passed in the full House.

The version of the Privacy Act enacted by the Senate was substantially different than the one which passed the House. Under the Senate bill as submitted to committee, requests for information about third parties disclosable under the FOIA privacy scheme were not exempted from disclosure by the Privacy Act. *See* S. 3418, 93d Cong., 2d Sess. § 205(b) (1974), *reprinted in* Source Book, *supra* p. 5 at 365, U.S.Code Cong. & Admin.News 1974, p. 6916. The Senate committee then adopted generally the House version of the legislation, but reinstated section (b)(2). *See* S. 3418, as amended, 93d Cong., 2d Sess. § 552a(b)(2) (1974), *reprinted in* Source Book, *supra* p. 5, at 463. The disagreement over the interface between the FOIA and the Privacy Act continued after referral back to the House, with the House again deleting section (b)(2). The matter was finally resolved in favor of the Senate position by way of compromise amendment.[3] The purpose of the amendment, which is the current section (b)(2), was explained in an analysis placed in the record by Senator Ervin and Representative Moorhead as chairmen of the respective committees:

> One difficult task in drafting Federal privacy legislation was that of determining the proper balance between the public's right to know about the conduct of their government and their equally important right to have information which is personal to them maintained with the greatest degree of confidence by Federal agencies. The House bill made no specific provision for Freedom of Information Act requests of material which might contain information protected by the Privacy Act....
>
> . . . . .

3. The compromise amendments to the Privacy Act were worked out informally by the staffs of the respective House and Senate committees working on the legislation rather than by submitting the bill to conference committee. *See* 120 Cong.Rec. 40400 (1974) (statement by Sen. Ervin).

> The Senate bill provided that nothing in the act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder. *This section was intended as specific recognition of the need to permit disclosure under the Freedom of Information Act.*
>
> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual *unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.*

120 Cong.Rec. 40405, 40406 (1974) ("Analysis of the House and Senate Compromise Amendments to the Federal Privacy Act") (emphasis added), *reprinted in* Source Book, *supra* p. 5, at 861; 120 Cong.Rec. 40881, 40881 (1974) (same), *reprinted in* Source Book, *supra* p. 5 at 989.[4]

The purpose of § 552a(b)(2) was further explained by James Davidson, Counsel to the Senate Government Operations Subcommittee on Intergovernmental Relations:

> It was not without considerable deliberation [ ] that the mechanism in section b(2) [sic] of the Act was chosen to allow present case law to control in the balance between requests for public disclosure of information held by the government and the need to protect the privacy of individual citizens.
>
> Section b(2) states that: [quoting the Act]
>
> In other words, if information about an individual would be released under an FOIA Act request [sic], it could be released under b(2) of the Privacy Act. The standard for release under the FOI Act is in section b(6) which permits the withholding of information the release of which would constitute a "clearly unwarranted invasion of personal privacy."

Davidson, *The Privacy Act of 1974—Exceptions and Exemptions*, 34 Fed.Bar J. 279, 280 (1975) (footnotes omitted), *reprinted in* Source Book, *supra* p. 5, at 1191–92.[5] *See generally Greentree*, 674 F.2d at 81–85.

The legislative history thus confirms the plain language of the statute regarding the interface between the two statutes where a FOIA request is made for information regarding a third party. What nevertheless causes us to review our decision of April 6, is the statement in *Greentree* that the court was "break[ing] stride" with the Seventh Circuit's reading of the Privacy Act in *Terkel v. Kelly*, 599 F.2d 214 (7th Cir.1979), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980).

Terkel involved a request by the plaintiff for information about himself contained in law enforcement and personnel files, a "first party" request. The majority of the court's opinion focused on the justification for withholding information pursuant to § 552(b)(7) of the FOIA. *See* 599 F.2d at 216, 217–18. The court also cited the Privacy Act, § 552a(k)(5), in permitting the FBI to withhold certain documents concerning the appellant's application for employment with the agency. The court stated:

> Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt.

Id. at 216. It is this statement which forms the basis for the D.C. Circuit's conclusion that *Greentree* "breaks stride" with the law of this circuit. Regardless of how per-

4. In the absence of a conference committee, we construe the "Analysis" submitted by the chairman of the respective Senate and House committees responsible for the legislation as the equivalent of a conference committee report.

5. Mr. Davidson's role in shaping the compromise legislation was recognized on the floor of the Senate. *See* 120 Cong.Rec. 40410 (1974) (statement of Sen. Muskie).

suasive we believe the opinion in *Greentree* to be, if the law of this circuit is to the contrary we are required to follow it. We do not believe, however, that the statement in *Terkel* controls the case at bar.

We deal here with a totally separate portion of the Privacy Act involving third party rather than first party requests. The former is governed by §§ 552a(b) and 552a(b)(2) which is outlined above. The court in *Terkel* had no occasion to review or consider section (b)(2) of the Act which specifically exempts from the prohibition on release material required to be disclosed under the FOIA, because first party requests fall under a different section of the statute which does not contain similar language. Section 552a(b) comes into play only where there is no "written request" by or "prior written consent" of the subject of the inquiry. In *Terkel*, and *Greentree* as well, plaintiff requested material concerning himself and therefore section (b), and its exemptions, were not at issue. The court focused instead on the restrictions to first party access which follow § 552a(d). Upon finding an applicable exemption in section (k)(5) the court attempted to reach an accommodation between the two statutes to avoid inconsistent results. Since our view is that section (b)(2) *incorporates* the FOIA for third party requests where no prior consent is obtained, we need not attempt to reconcile any inconsistency in the two statutes. For that reason, we do not believe the statement in *Terkel* is controlling.

[3] As the length of this review indicates however, we are concerned that our decision here may run contrary to the view expressed in *Terkel*. It is fair to say that decision is cryptic and we are unsure of the parameters of the "accommodation" between the two statutes envisioned by that case. It is also possible that in light of the decision in *Greentree* and criticism of the result reached in *Terkel* the court of appeals may wish to re-examine its position.[6] In light of the fact that we believe the questions raised here are substantial, and that the government's position would be mooted if it was compelled to respond to plaintiff's FOIA request prior to appeal, we find that the stay requested by the government is appropriate.

Moreover, the interests of non-parties about whom the information is requested argues for a stay to resolve the matter prior to the FBI's response. And we do not believe the delay occasioned by appeal will burden plaintiff since, under our order of April 6, he is not yet entitled to the material he seeks in any event. The substance of our decision with respect to the counts now challenged by the government was to *deny* plaintiff's motion for summary judgment; we did not order any material released to the plaintiff, only that the government claim whatever exemptions it seeks under the standards established in this circuit for FOIA cases. *See* n. 2 *supra*.

In presenting its motion for a stay the government asserts that the April 6 order is appealable as an injunction against the FBI. *See Miller v. Bell*, 661 F.2d 623, 625 (7th Cir.1981). However, unlike *Miller*, in the instant case we have yet to consider defendants' claims of exemption based on the documents it finds pursuant to plaintiff's FOIA request. Should the court of appeals conclude the April 6 order is not appealable, we will grant a motion to certify under 28 U.S.C. § 1292(b), because the case involves controlling questions of law which will aid in resolution of this and other lawsuits.

The order of April 6, 1982 is ordered stayed until further order of the Court of Appeals.

6. *See* 1 K. Davis, Administrative Law Treatise § 5.43, p. 100 (1978 ed. Supp.1982); R. Bouchard and J. Franklin, Guidebook to the Freedom of Information Act 21-22 (1980); *Id.* 30-31 (Supp.1981). In particular we are concerned that our interpretation of § (b)(2) taken together with *Terkel* may create the so-called "third party anomaly" addressed at length in *Greentree*, 674 F.2d at 79.

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 83-

Michael C. Antonelli (Petitioner or Appellant) vs. Federal Bureau of Investigation, et al. (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Michael C. Antonelli

(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Jeffrey J. Kennedy

(Type or print) Name Jeffrey J. Kennedy

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Kirkland & Ellis

Address 200 East Randolph Drive

City & State Chicago, Illinois Zip 60601

Phone (312) 861-2270

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-78A

No. 83-

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHAEL C. ANTONELLI,

Petitioner,

vs.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Jeffrey J. Kennedy, counsel of record for petitioner and a member of the Bar of this Court, hereby state that I caused a copy of each of the foregoing Motion For Leave To Proceed In Forma Pauperis, Petition For Writ Of Certiorari, and Appearance to be served upon all parties required to be served by depositing said copies in envelopes, first class postage prepaid, addressed to:

Hon. Rex E. Lee
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

Eloise E. Davies
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

Dan K. Webb
United States Attorney
219 South Dearborn Street - 15th Floor
Chicago, Illinois 60604

and placing same in the United States mail at 200 East Randolph Drive, Chicago, Illinois, on February 21, 1984.

Jeffrey J. Kennedy

No. 83-

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHAEL C. ANTONELLI,

Petitioner,

vs.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Michael C. Antonelli respectfully requests that this Court grant him leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Pursuant to Supreme Court Rule 46(1), petitioner's affidavit in the form of Federal Rules of Appellate Procedure Form 4 is attached. Petitioner was granted leave to proceed in forma pauperis in the United States Court of Appeals for the Seventh Circuit below.

WHEREFORE, petitioner respectfully requests that the Court enter an order granting him leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Respectfully submitted,

Jeffrey J. Kennedy
(Counsel of Record)
Ann R. Platzer
John Thorne

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Petitioner

Dated: February 21, 1984

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

MICHAEL C. ANTONELLI,	)	
	)	
Petitioner,	)	On Petition For Writ Of
	)	Certiorari to the United
v.	)	States Court of Appeals
	)	For the Seventh Circuit
FEDERAL BUREAU OF INVESTIGATION, et al.,	)	
	)	
Respondents.	)	

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS
IN THE SUPREME COURT OF THE UNITED STATES

I, Michael C. Antonelli, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed in the Supreme Court of the United States without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issue which I desire to present to the Supreme Court is the following:

> Whether a district court is required to grant summary judgment in favor of an agency that has denied a third-party Freedom of Information Act request because the requester has not "identified some public interest to be served by disclosure of the information," even though the agency has not submitted any evidence to support its claim of exemption?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in the Supreme Court are true.

1. Are you presently employed?

> Yes. However, I am paid no salary at present. Lieutenant Roman Kuleweicz at the MCC in Chicago, Illinois, is my employer.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

I have received numerous gifts and donations from friends and relatives to pay for basic needs, such as stamps, telephone calls, coffee, soap, etc.

3. Do you own any cash or checking or savings account?

I have only a prison commissary account, the balance of which is $101.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael C. Antonelli

SUBSCRIBED AND SWORN TO before me this 15 day of February, 1984.

Notary Public

Let the Petitioner proceed without prepayment of costs or fees or the necessity of giving security therefor.

District Judge